Filed 2/13/19 P. v. Lawless CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KRISTOPHER WILLIAMS LAWLESS, Defendant and Appellant.	F075203 (Super. Ct. No. BF162059A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein, Carlos A. Martinez and Matthew A. Kearney, Deputy Attorneys General, for Plaintiff and Respondent

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INTRODUCTION

Defendant Kristopher Williams Lawless was charged with and convicted of child endangerment (and other counts unrelated to this appeal) in violation of Penal Code[1] section 273a, subdivision (a) after driving recklessly while fleeing from officers with an improperly restrained child in his car. The child's mother was a passenger in the car.

Defendant had a prior serious felony conviction within the meaning of the three strikes law and the court found true the section 667, subdivision (a) enhancement. The court sentenced defendant to a 12-year term (upper term of six years, doubled under the three strikes law) on the child endangerment conviction. The trial court further imposed a consecutive five-year term for the prior serious felony conviction enhancement, for a total consecutive term of 17 years in prison.

On appeal, he contends insufficient evidence supports the jury's conclusion he had care or custody of the child as was necessary to support his child endangerment conviction. Defendant also filed supplemental briefing based on newly enacted Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill 1393), which ends the statutory prohibition on the trial court's ability to strike a prior serious felony enhancement. He seeks remand to allow the trial court to reconsider sentencing, considering the new law that allows it discretion to strike the five-year enhancements imposed for prior serious felony convictions.

We affirm the conviction and remand this matter for resentencing to allow the trial court to exercise its discretion regarding whether to dismiss the section 667, subdivision (a) enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2015, defendant drove himself and Jane Doe, with whom he had previously been in a relationship, to his friend Steven's house. While there, defendant

[1] Undesignated statutory references are to the Penal Code.

and Jane smoked methamphetamine, heroin, and ingested Xanax. Defendant began getting angry at Jane and blaming her for his problems.

He and Jane eventually left to pick up Jane's one-year-old son Charlie from the babysitter and then returned to Steven's house with the child. Defendant got "angrier," "started getting a little crazy," and told Jane to go outside with him. Defendant forcefully told Jane to get in his truck. She complied, though she told defendant she did not want to leave Charlie with Steven. Defendant drove Jane and himself to an empty parking lot where he parked and began hitting Jane. Using a zip tie, defendant bound Jane's wrists together and tied them to the glove compartment with an auxiliary cord. According to Jane, defendant first penetrated her vagina with a sex toy and then penetrated her anus with his penis. At some point later, she and defendant were outside of the truck. Defendant hit her in the face and she lost consciousness. When Jane regained consciousness, defendant told her to get back in the truck, and he drove them back to Steven's house.

Defendant went inside the house and brought Charlie out. He put Charlie's car seat in the passenger seat next to Jane, but Charlie was not properly buckled in and defendant did not secure the car seat in place with the seat belt. Defendant then drove them to a gas station where he got out to pay for gas. When he returned to the car, defendant hit Jane in the mouth because he suspected she had spoken to a man standing nearby. He hit Jane with enough force that "blood got everywhere," including on Charlie's face. He then "drove off crazy, stopped right before exiting the [gas station], and ripped his ankle monitor off, and threw it in the bushes." He told Jane he had to kill her because he did not want to go back to prison. Charlie would not stop crying, and Jane was concerned for her and Charlie's safety. Jane grabbed Charlie from his car seat and tried to comfort him, but when defendant started driving fast, she "hurriedly put [Charlie] back into the car seat and strapped his chest strap" but she was not able to fully buckle him in. Defendant was driving "recklessly," "very fast and crazy," weaving "in and out

of cars." Jane held on to both sides of the car seat to keep it from tipping over. They passed a group of three or four police officers who tried to flag them down, but defendant raced past them. Defendant then drove the truck off the road into an orchard where it got stuck in a ditch. Defendant exited the truck to try to push it, then ran away. Jane got out of the truck, grabbed the car seat with Charlie in it, and went to a nearby fieldworker for help.

Jane called the police from the fieldworker's phone. The police arrived and told Jane they had caught someone. Jane identified defendant as the driver and the person who had caused injuries to her upper lip, right eye, and wrists. The People introduced photographs of Jane's injuries and an audio recording of Jane's 911 call.

Defendant was charged with sodomy of Jane against her will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury in violation of section 286, subdivision (c)(2)(A) (count 1), a forcible act of sexual penetration by a foreign object in violation of section 289, subdivision (a)(1)(A) (count 2), kidnapping in violation of section 207, subdivision (a) (count 3), making criminal threats in violation of section 422 (count 4), willful infliction of corporal injury on Jane in violation of section 273.5, subdivision (a) (count 5), false imprisonment in violation of section 236 (count 6), and, relevant here, child endangerment in violation of section 273a, subdivision (a) (count 7). The court dismissed count 6 before the case was submitted to the jury, concluding it was a lesser included offense of count 3.

The jury could not reach a verdict as to counts 1 and 2; the court declared a mistrial as to those counts. The jury found defendant not guilty of kidnapping as alleged in count 3, but guilty of the lesser included offense of false imprisonment. It also convicted defendant of counts 4, 5, and 7. The court found true a prior serious felony enhancement pursuant to section 667, subdivision (a). It sentenced defendant to a total fixed term of 17 years' imprisonment on count 7—12 years plus a five-year enhancement for the prior serious felony enhancement. The court further sentenced defendant to the

upper term of six years on count 3, the upper term of six years on count 4 plus a five-year enhancement under section 667, subdivision (a) to be served consecutively, and to eight years on count 6, all of which were to be stayed pursuant to section 654.

DISCUSSION

I. Sufficiency of the Evidence

Defendant argues the evidence was insufficient to support his conviction for child endangerment.

A. Standard of Review

On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) The reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) It is the jury, not the appellate court, which must be convinced of a defendant's guilt beyond a reasonable doubt. (*Ibid*.) If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*Ibid*.)

We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon

no hypothesis … is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid*.)

B. Applicable Law

Section 273a, subdivision (a) provides in relevant part: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, … having the care or custody of any child, … willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."

> "Section 273a does not require that a defendant be related to a child. As stated in *People v. Cochran* (1998) 62 Cal.App.4th 826, 832, '[t]he terms "care or custody" do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.' There is 'no special meaning to the terms "care or custody" beyond the plain meaning of the terms themselves' that is indicated or intended. [Citation.] Interpreting *Cochran*, the court in *People v. Perez* (2008) 164 Cal.App.4th 1462, 1476, stated: '[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all. "Care," as used in the statute, may be evidenced by something less than an express agreement to assume the duties of a caregiver. That a person did undertake caregiving responsibilities may be shown by evidence of that person's conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so.' (Fn. omitted.)" (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1083.)

C. Analysis

Defendant argues the child endangerment conviction must be reversed because there was insufficient evidence from which the jury could find beyond a reasonable doubt that he had care or custody of Charlie "pursuant to any duty imposed by law, court order, or formalized agreement," or that he was assigned or assumed the duties of a caregiver

while driving his truck. Instead, he contends the evidence showed "Jane had legal custody of Charlie" and Charlie was in Jane's care while in defendant's truck. He further argues "the prosecutor's statements during closing argument that [defendant] had the care of everyone in his truck, including both Charlie and Jane, [were] incorrect and misleading."

In the factually similar case of *People v. Morales*, *supra*, 168 Cal.App.4th 1075, the court affirmed a defendant's child endangerment conviction, holding there was substantial evidence to support it where defendant fled from police, sped through a stop sign without stopping, ran a red light, and collided with a telephone pole and metal post, all with a child in the car. (*Id*. at p. 1078.) The *Morales* court held the child "was physically in the care of defendant who was transporting her when he endangered her life by his conduct. As a passenger in his speeding car, [the child] was deprived of her freedom to leave, and she had no control over the vehicle. The jury could reasonably conclude that in taking it upon himself to control [the child's] environment and safety, defendant undertook caregiving responsibilities or assumed custody over her while she was in his car." (*Id.* at pp. 1083–1084.)

Defendant argues his case is distinguishable from *People v. Morales* because Charlie was not riding in the truck with defendant without a parent present. Similarly, he argues *People v. Malfavon* (2002) 102 Cal.App.4th 727, in which a mother left her child alone with the defendant in the car, is distinguishable because Charlie was not left alone in the truck with defendant. (*Id*. at pp. 731–732, 736–737.) However, we find no meaningful difference between *Morales*, *Malfavon*, and the instant case. In those cases, as in the instant case, the defendants were in control of and thus responsible for the children's environment and safety.

Here, there was evidence defendant placed Charlie, who was in his car seat, in the front seat of defendant's truck. As in *Morales*, defendant was in control of the truck in which Charlie was a passenger. There was also evidence defendant was driving

recklessly and speeding while fleeing from police. Thus, Charlie was physically in the care of defendant when defendant endangered Charlie's life by his conduct. The fact that Jane was also a passenger in the vehicle is inconsequential. As a passenger in defendant's speeding truck, one-year-old Charlie was deprived of his freedom to leave, and neither he nor Jane had control over the vehicle or defendant's erratic driving. Additionally, even if Charlie was still in Jane's care or custody, "[t]he language of the statute does not suggest that only one person at a time can have the care or custody of a child." (*People v. Perez*, *supra*, 164 Cal.App.4th at p. 1472.)

On this record and viewing the evidence in the light most favorable to the jury's verdict, we conclude sufficient evidence supported the jury's conclusion that defendant's conduct and the circumstances of the interaction established he had sufficient care or custody of Charlie to support defendant's child endangerment conviction.

II. Remand for Consideration of Senate Bill 1393

Senate Bill 1393, signed into law on September 30, 2018, amends sections 667 and 1385 to provide the trial court with discretion to dismiss, in furtherance of justice, five-year enhancements imposed pursuant to section 667, subdivision (a)(1). The new law became effective on January 1, 2019. The law is applicable to those parties, like defendant, whose appeals are not final by the law's effective date. Here, defendant seeks remand to permit the trial court to review his five-year enhancement for a prior serious felony in light of Senate Bill 1393. The People respond the court's language at sentencing reflects it would not have struck defendant's strike even if it had discretion to do so; thus, remand is not required.

Our Supreme Court has held "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on

misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, … the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425–428.)

During the sentencing hearing the court made the following statements and orders:

> "[THE COURT:] I find no circumstances in mitigation.
>
> "I find the following circumstances in aggravation: one, the defendant's prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous and increasing in seriousness; two, the defendant was on parole when the crime was committed; three, the defendant's prior performance on juvenile probation, felony probation, and misdemeanor probation was unsatisfactory in that he failed to comply with terms and reoffended.
>
> "I find the defendant qualifies for punishment in [the California Department of Corrections and Rehabilitation] based on the current offenses in counts 4, 5, and 7 as well as the prior conviction for a serious or violent offense.
>
> "I find the defendant to be statutorily ineligible for a grant of felony probation pursuant to … Section 667 Subdivision (c)(2) in that he has a strike prior.
>
> "With regard to probation suitability, I agree with the analysis of probation that the defendant would absolutely be unsuitable for a grant of felony probation, and that's based on a review of his criminal record and the circumstances surrounding the present offenses.
>
> "The defendant's pattern of criminal conduct is consistent. It reflects a lengthy criminal record which includes a history of violence as evidenced in case numbers BF144935A and BM864067A.
>
> "The defendant's prior performance on probation was below standard, and he was on parole for a domestic violence-related crime when the instant offenses occurred. The case circumstances are serious as they involve the victim being tied up and assaulted while the minor victim was left unsecured in a car seat while the defendant drove dangerously and at high rates of speed. The defendant's ongoing violent behavior poses a

significant risk to both the victims and community safety. And I agree that a prison commitment is justified.

"Considering the aggravating circumstances, none in mitigation, I agree that the upper term—I am exercising my discretion to find the upper term is the appropriate term in this case. And I also will select Count 7 [child endangerment] as the principal term. [¶] … [¶]

"So I am going to find, in exercising my discretion, that it's appropriate to impose counts 3, 4, and 5 concurrently under … Section 654. The Court has already confirmed that even if these are imposed concurrently I have no discretion to also have what we call a nickel prior, the … Section 667 Subdivision (a) five-year enhancement, run concurrent. That must be imposed consecutively by law.

"So the Court's sentence will be to impose the 12 years on Count 7 and have the other counts concurrent. And we will figure out the wording to make the five years still part of the sentence and not concurrent so that the total fixed term will be 17 years.

"I appreciate [the prosecutor's] argument that the defendant is a risk not only to the persons that he has caused injury and threats to but also to the general public. And the Court is satisfied that a 17-year term is not a light sentence, by any means. It's a substantial sentence and I think well within the Court's discretion considering, all the different criteria we consider under sentencing.

"Obviously, the protection of the public is one of the important things we do when we sentence. But we also consider other circumstances, including the hope with any defendant that there might be some ability to rehabilitate, to serve the sentence, get whatever counseling and other services are provided in prison, and hopefully come out of prison and resume a law-abiding life as an older and wiser person.

"I don't have any way of knowing that that's possible with [defendant]. But with every defendant that I sentence that's, obviously, something that we, as a society, would desire to see. We don't like to just warehouse people indefinitely, regardless of their ability to rehabilitate."

This record does not reflect the trial court knew it had discretion to strike defendant's section 667, subdivision (a) enhancement; nor does it reflect a clear indication by the trial court that it would not have struck this enhancement if it had discretion to do so. Accordingly, we remand this matter for resentencing so the trial

court may consider whether to exercise its newly created discretion to dismiss the enhancement.

DISPOSITION

We affirm the conviction and the matter is remanded for resentencing.

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PEÑA, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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DETJEN, J.